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IN THE

UNITED STATES CIRCUT COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 7843

WILLIAM R. MACKLIN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

STATEMENT OF THE CASE

William R. Macklin was indicted for violation of Sections 404 and 1181 of Title 26, U.S.C.A. After a

presentation of the case the jury returned a verdict of guilty as charged in Count 1, being a violation of Section 404, and not guilty as charged in Count II which alleged a violation of Section 1181.

Clyde J. Shaw, Investigator of the Alcohol Tax Unit of the Internal Revenue Department, testified, together with C. J. Gibbs, another officer in the same employ, that on July 16, 1934, they were parked in an auto at Port Angeles, Washington, in the vicinity of the alley in the rear of Number 424 East 11th Street in the said city. At that time they were watching all cars which were passing in that vicinity for the reason that information had been received that liquor would be transported to the premises above. Shaw observed two automobiles, one following the other, entering the alley in back of Number 424 East 11th Street. There was one man in each car, the first car being a Buick, and the defendant followed, driving a 1933 Chevrolet. Macklin brought his car to a stop and had just stepped out of the car carrying a carton containing empty one-gallon jugs when Shaw and Gibbs drove in back of the premises and came to a stop a few feet from the Macklin car. Shaw and Gibbs saw the cartons and bottles which indicated to them that Macklin had liquor in the car. Macklin was placed under arrest and a search of the automobile disclosed five or six

empty one-gallon jugs and three full one-gallon jugs containing alcohol whiskey. (Tr. 24-25).

Shaw testified, as did Gibbs, that neither the containers nor the cartons bore tax stamps or labels of any kind at the time of the arrest. Macklin admitted to the officers that the liquor was his and that it was alcohol whiskey. Macklin was searched and was found to have $326 in his possession. He told the officers that he used to work as a shingle weaver but couldn't do that kind of work any more. (Tr. 24-25).

ARGUMENT

QUESTIONS TO BE DETERMINED

Appellant's brief sets forth two points for answer which will be the scope of appellee's brief:

(1.) Was there sufficient evidence to prove the element of non-payment of tax in violation of Title 26, U.S.C.A., Section 404?

(2.) Did the acquittal of the violation of Title 26, U.S.C.A., Section 1181, bar conviction for violation of Title 26, U.S.C.A., Section 404, and was verdict inconsistent?

THERE WAS SUFFICIENT PROOF OF NON-PAYMENT OF TAX IN VIOLATION OF TITLE 26 U.S.C.A., SECTION 404.

Appellant has adopted a position which is cer-

tainly not tenable when considered in relation to the Liquor Taxing Act of 1934 (Title 26 U.S.C.A., Sections 267 to 273). This act requires that all containers of distilled spirits must have affixed thereto tax stamps, with certain exceptions not important here. This was in effect when the crime was committed on July 16, 1934. (Tr. 25-26). The act completely nullifies the section cited by appellant which required that all containers of five gallons or more must bear upon them stamps denoting payment of tax. So cases cited based upon that statute can be of no efficacy now, except to extend the doctrine of presumption to all containers of distilled spirits. Whereas, prior to the passage of the Liquor Taxing Act of 1934 such a position might have weight, such is not the case now. The logical conclusion is that the cases cited by appellant should be extended now in their presumption from five-gallon containers or more to include containers of less capacity. The pertinent provisions of Section 267, Title 26, U.S.C.A. (Liquor Taxing Act of 1934) are as follows:

> "No person shall * * * transport, possess, buy, sell, or transfer any distilled spirits, unless the immediate container thereof has affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all internal-revenue taxes imposed on such spirits.

* * *" (Jan. 11, 1934, c.1, Title II, Sec. 201, 48 Stat. 316.)

The pertinent provisions of Section 272, Title 26, U.S.C.A. (Liquor Taxing Act of 1934) are as follows:

> "All distilled spirits found in any container required to bear a stamp by sections 267 to 273 of this title, which container is not stamped in compliance therewith and regulations issued thereunder, shall be forfeited to the United States.
>
> * * *" (Jan. 11, 1934, c.1, Title II, Sec. 206, 48 Stat. 317.)

It will be noted in reading the latter section that this completely supersedes Section 266, Title 26, U.S. C.A., which provided as follows:

> "All distilled spirits found in any cask or package containing five gallons or more, without having thereon each mark and stamp required therefor by law, shall be forfeited to the United States."

Instructions given by the Court to the jury provided that the government had to prove beyond a reasonable doubt the allegations set forth in the two counts of the indictment. (Tr. 30-35). The Court did not instruct that the jury could presume from the fact that there were no tax stamps on the containers that the tax was unpaid, and then the burden of proving that the tax was paid would shift to the defendant. From the instructions the jury could take into con-

sideration the fact that there were no tax stamps on the containers in determining whether or not in conjunction with the rest of the evidence the tax had or had not been paid. Most certainly there was other evidence; the admission by the defendant that the seizure was alcohol whiskey, coupled with the fact that Macklin said he used to be a shingle weaver but couldn't do that kind of work any more, coupled with the fact that at the time of his arrest there was found to be $326 in his possession. (Tr. 25-26).

The Court might well have instructed that it was presumed that the evidence showed from the absence of tax stamps on such a container or containers involved herein that the tax had not been paid and that thereupon the burden of proving that the tax had been paid would be shifted to defendant. The Court did not do this, but put the government on its proof, allowing the jury to consider whether or not a tax had or had not been paid without shifting the burden to the defendant. Indeed, the courts have held in analogous cases under the internal revenue laws where the facts were peculiarly within the knowledge of the defendant that such facts could be presumed. For instance, in *Rossi vs. U. S.*, 289 U.S. 89, where the defendant was charged with having possession and control of a still not registered, the Court held:

"The lower federal courts generally have accepted the doctrine that proof of the custody or control of a still for unlawful distillation of alcoholic spirits is enough to give rise to an inference of lack of registration and failure to give bond *which the defendant must overcome by proof. Barton v. United States*, 267 Fed. 174, 175; *McCurry v. United States*, 281 Fed. 532, 533; *Goodfriend v. United States*, 294 Fed. 148, 150; *Giacolone v. United States*, 13 F. (2d) 108, 110; *Seiden v. United States*, 16 F. (2d) 197, 199; *Colasurdo v. United States*, 22 F. (2d) 934, 935; *Cardenti v. United States*, 24 F. (2d) 782, 783; *Mangiaracina v. United States*, 40 F. (2d) 164, *Stark v. United States*, 44 F. (2d) 946, 949, 950. And see *Faraone v. United States*, 259 Fed. 507, 509; *Sharp v. United States*, 280 Fed. 86, 89."

In connection with proof in such cases it is well to consider Title 26, U.S.C.A., Sec. 327:

"Whenever seizure is made of any distilled spirits found elsewhere than in a distillery or distillery warehouse, or other warehouse for distilled spirits authorized by law, or than in the store or place of business of a rectifier, or of a wholesale liquor dealer, or than in transit from any one of said places; or of any distilled spirits found in any one of the places aforesaid, or in transit therefrom, which have not been received into or sent out therefrom in conformity to law, or in regard to which any of the entries required by law to be made in the books of the owner of such spirits, or of the storekeeper, wholesale dealer, or rectifier, have not been made at the time or in the manner required, or in respect to which the owner or person having possession, control, or charge of said

> spirits, has omitted to do any act required to be done, or has done or committed any act prohibited in regard to said spirits, the burden of proof shall be upon the claimant of said spirits to show that no fraud has been committed, and that all the requirements of the law in relation to the payment of the tax have been complied with."

The conclusion is irresistible that the doctrine of presumption of non-payment of tax as set forth in such cases as *Commercial Credit Corporation vs. U. S.*, 18 Fed. (2d) 927, must of necessity be extended to carry such a rule, or at least the consideration of such evidence, to containers of less than five gallons of distilled spirits.

DEFENDANT CHARGED WITH VIOLATION OF TWO SEPARATE AND DISTINCT STATUTES AND ACQUITTAL ON ONE COUNT WILL NOT BAR CONVICTION ON OTHER AND VERDICT NOT INCONSISTENT.

In *Blockburger vs. U. S.*, 284 U.S. 299, Blockburger was charged with making a sale of morphine not in an original stamped package, in violation of Section I of the Narcotics Act, and making a sale of morphine not in pursuance of a written order of the person to whom the drug is sold, in violation of Section II of the same act. It appears that these two counts were based upon one and the same act. The question involving the appeal was inasmuch as there was but one

sale were both sections violated by the same act and did the accused commit two offenses or only one? The Court said:

> "Each of the offenses created requires proof of a different element. The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. *Gavieres v. United States*, 220 U.S. 338, 342, and authorities cited. In that case this court quoted from and adopted the language of the Supreme Court of Massachusetts in *Morey v. Commonwealth*, 108 Mass. 433: 'A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under th other.' "
> Following the test laid down in the *Blockburger*

case, *supra*, we find that Macklin was charged with the violation of two separate and distinct statutes, one, Section 404, Title 26, U.S.C.A., being a felony, and the other, Section 1181, Title 26, U.S.C.A., being merely a misdemeanor. Section 404 is as follows:

> "Removal or concealment of spirits contrary to law. Whenever any person removes, or aids or abets in the removal of any distilled spirits on which the tax has not been paid, to a place other than the bonded warehouse provided by law, or conceals or aids in the concealment of any spirts

so removed, or removes, or aids or abets in the removal of any distilled spirits from any distillery warehouse, or other warehouse for distilled spirits authorized by law, in any manner other than is provided by law, or conceals or aids in the concealment of any spirits so removed, he shall be liable to a penalty of double the tax imposed on such distilled spirits so removed or concealed, and shall be fined not less than $200 nor more than $5,000, and imprisoned not less than three months nor more than three years."

and Section 1181 is as follows:

"Removing or concealing articles with intent to defraud United States. Whenever any goods or commodities for or in respect whereof any tax is or shall be imposed, or any materials, utensils, or vessels proper or intended to be made use of for or in the making of such goods or commodities are removed, or are deposited or concealed in any place, with intent to defraud the United States of such tax, or any part thereof, all such goods and commodities, and all such materials, utensils, and vessels, respectively, shall be forfeited; and in every such case all the casks, vessels, cases, or other packages whatsoever, containing or which shall have contained, such goods or commodities, respectively, and every vessel, boat, cart, carriage, or other conveyance whatsoever, and all horses or other animals, and all things used in the removal or for the deposit or concealment thereof, respectively, shall be forfeited. And every person who removes, deposits, or conceals, or is concerned in removing, depositing, or concealing any goods or commodities for or in respect whereof any tax is or shall be imposed, with intent to defraud the

United States of such tax or any part thereof, shall be liable to a fine or penalty of not more than $500."

The gist of the offense set forth in Title 26, U.S. C.A. Section 1181 is the removal, depositing or concealing, or the being concerned in removing, depositing or concealing any goods or commodities for or in respect whereof any tax shall be imposed *with intent to defraud the United States of such tax or any part thereof*, shall be liable to a fine or penalty of not more than $500.

The element of removing or concealing or depositing with intent to defraud the United States of the tax is entirely absent from Section 404 which prohibits the removal of any distilled spirits upon which the tax has not been paid to a place other than the bonded warehouse provided by law, or conceals or aids in the concealment of any spirits so removed * * *, shall be fined not less than $200 nor more than $5,000, and imprisoned not less than three months nor more than three years.

It takes different proof to establish these two separate crimes although they may possibly be based upon the same act or acts .

Appellant tries to derive comfort from *Morgan vs.*

Devine, 237 U.S. 632, 35 S.Ct. 712. An examination of that authority reveals that it holds in favor of appellee's contention. In that case the defendant was charged in two counts—one with forcible breaking into the postoffice of the United States with intent then and there to commit larceny in such building. The second count charged him on the same date and at the same place with stealing certain property and monies from a United States postoffice. The Court held that these were two separate and distinct offenses. The Court said:

> "In *Burton v. United States*, 202 U.S. 344, 50 L.ed. 1057, 26 Sup.Ct.Rep.688, 6 Ann.Cas. 362, the defendant was charged in separate counts with receiving compensation in violation of the act, and also agreeing to receive compensation in violation of the same statute. In that case the contention was that the defendant could not legally be indicted for two separate offenses, one agreeing to receive compensation, and the other receiving such compensation, in violation of the statute, but this court held that the statute was so written, and said:
>
> " 'There might be an agreement to receive compensation for services to be rendered without any compnsation ever being in fact made, and yet that agreement would be covered by the statute as an offense. Or, compensation might be received for the forbidden services without any previous

> agreement, and yet the statute would be violated. In this case, the subject-matter of the sixth count, which charged an agreement to receive $2,500, was more extensive than that charged in the seventh count, which alleged the receipt of $500. But Congress intended to place its condemnation upon each distinct, separate part of every transaction coming within the mischiefs intended to be reached and remedied. Therefore an agreement to receive compensation was made an offense. So the receiving of compensation in violation of the statute, whether pursuant to a previous agreement or not, was made another and separate offense. There is, in our judgment, no escape from this interpretation consistently with the established rule that the intention of the legislature must govern in the interpretation of a statute. "It is the legislature, not the court which is to define a crime, and ordain its punishment." *United States v. Wiltberger*, 5 Wheet. 76, 95, 5 L.ed.37, 42; *Hackfeld & Co. v. United States*, 197 U.S. 442, 450, 49 L.ed.826, 25 Sup.Ct.Rep. 456.' "

To the same effect see *Carter vs. McClaughry*, 183 U.S. 367, 22 Sup.Ct. 181, *Gavieres vs. U. S.*, 220 U.S. 337.

Rosenthal vs. U. S., 276 Fed. 716, cited by appellant presents a situation different from ours. No more and no less proof was required to support the first and second counts, both charging defendant had in his possession with guilty knowledge property that was stolen. The second count charged the defendant with the same crime at the same time. It involved but one

transaction and required but the same proof. Such a situation is not involved here—one violation dealing with an intent to defraud the United States, and the other removal or concealment of untax-paid distilled spirits. Section 404 refers to distilled spirits alone, and Section 1181 refers to any commodity upon which a tax is or shall be imposed.

Further, in answer to the case of *Hohenadel Brewing Co. vs. U. S.*, 295 Fed. 489, (a third Circuit case) cited by appellant, the cases below go even further than the cases already cited by appellee:

The judges of the Ninth Circuit Court of Appeals, in *Panzich vs. U. S.* (9th C.C.A.), 285 Fed. 871, decided:

> "We find no merit in the second assignment, that, inasmuch as Mary Panzich was acquitted of the charge of an unlawful sale, the verdict of guilty of maintaining a common nuisance cannot stand against her. Acquittal of making a sale is not inconsistent with guilt of keeping a place where the purpose is to sell and barter. That no business is done is immaterial, if the place is kept for the purpose of doing business. Under section 21 of title 2 of the National Prohibition Act, any room, house, or place where intoxicating liquor is sold, kept or bartered, in violation of the act, is declared to be a common nuisance, and under section 33 of the same title the possession of liquor by a person not lawfully permitted to possess it shall be *prima facie* evidence that such liquor is

kept for the purpose of being sold, bartered, exchanged, given away, or otherwise disposed of, in violation of the act. It is also provided that the burden of proof is upon the possessor, in any action concerning the same, to prove that such liquor was lawfully acquired, possessed, or used. It seems too clear for argument that, if liquor or wine was found upon the premises, it became incumbent upon the defendants to prove it was lawfully acquired or possessed or used by them.

"We find no reason for disturbing the judgment."

Seiden vs. U. S. (2nd C.C.A.), 16 Fed. (2d) 197:

"We have held that, when a jury convicts upon one count and acquits upon another the conviction will stand, though there is no rational way to reconcile the two conflicting decisions. *Marshallo vs. U. S.* (C.C.A.), 298 Fed. 74; *Steckler vs. U. S.* (C.C.A.) 7 Fed.(2d) 59."

In the light of the above we submit the verdict should not be disturbed.

Respectfully submitted,

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